

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte MICHAEL BUTSCH and RAINER BAUMGART

MAILED

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**U.S. PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES**

Appeal No. 2005-0951
Application No. 09/890,715

ON BRIEF

Before McQUADE, NASE and BAHR, Administrative Patent Judges.
BAHR, Administrative Patent Judge.

DECISION ON APPEAL

The appellants originally appealed from the examiner's final rejection of claims 27-33, claim 26 having been canceled and claim 27 re-written in independent form in an amendment filed August 8, 2003 subsequent to the final rejection (mailed May 7, 2003). Claims 29, 30 and 31 were also amended in the August 8, 2003 amendment to overcome an objection and indefiniteness rejection by the examiner and to change the dependency of claim 31 from cancelled 26 to claim 27. In the answer (mailed February 9, 2004), the examiner withdrew one rejection of claim 27 under 35 U.S.C. § 102 and the rejections of claims 28-33 under 35 U.S.C. § 103, maintaining only the rejection of

claims 27-29 under 35 U.S.C. § 102. Accordingly, only claims 27-29 are involved in this appeal.

BACKGROUND

The appellants' invention relates to a cutting-nozzle element for severing or removing a biological structure when the cutting-nozzle element is fed with a fluid under pressure. Further understanding of the invention can be obtained from a reading of independent claim 27, which is reproduced below in the opinion section of this decision.

The Rejection

Claims 27-29 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Kobayashi¹.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejection, we make reference to the answer for the examiner's complete reasoning in support of the rejection and to the brief (filed December 11, 2003) and reply brief (filed March 17, 2004) for the appellants' arguments thereagainst.

¹ European Patent Application No. 258,901, by inventors Kobayashi et al., published March 9, 1988.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art reference, and to the respective positions articulated by the appellants and the examiner. For the reasons which follow, we sustain the examiner's rejection.

Independent claim 27 reads as follows:

27. A cutting-nozzle element for severing or removing a biological structure when the cutting-nozzle element is fed with a fluid under pressure, comprising a hollow cutting-nozzle body having an axis, the hollow cutting-nozzle body receives a shut-off element which is movable within the hollow cutting-nozzle body in a reciprocating manner along the axis wherein the hollow cutting-nozzle body defines with the shut-off element an annular space, at least one nozzle extending radially with respect to the axis and communicating with the annular space, and further including means for reciprocating the shut-off element to provide a pulsed feed of fluid under pressure to the at least one radial nozzle.

Kobayashi discloses a surgical water jet operating apparatus for cutting or cutting off organs, etc., or washing internal cavities and outer surfaces of the human body by injection of liquid as well as drawing out by suction separated tissues or the like produced thereby (column 1, lines 6-12). The apparatus includes a handpiece 1' (Figures 8-10) provided with a change-over valve 42 which is usually urged upwardly, as shown in Figure 10, by a spring 43, so as to communicate the supply line 3 with the return line 41. When the change-over valve 42 is depressed, by means of manually

operable spring plate 44, and moved downwardly, the supply line 3 communicates with the injection hole 35 via supply path 32.

The appellants' argument as to why Kobayashi does not anticipate the subject matter of claim 27 is that, in the Kobayashi device, fluid is delivered axially out of the handpiece and, thus, there is no teaching or suggestion for a "radial nozzle" as called for in claim 27 (brief, page 5). The examiner responded to this argument on page 5 of the answer by pointing out that the Kobayashi handpiece 1' has an axis along which the change-over valve 42 travels and that the supply path 32 is transverse (or radial) with respect to this axis.

The appellants argue in their reply brief that the valve member 42 is transverse to the longitudinal axis of the nozzle and the opening (supply path 32) is actually along the longitudinal nozzle axis. According to the appellants, this structure is contrary to the language of independent claim 27, which requires that the at least one nozzle extends radially with respect to the axis of the hollow cutting-nozzle body. This argument is not well taken.

Claim 27 does not, as the appellants' argument would appear to suggest, recite that the cutting-nozzle body has a longitudinal axis. Rather, claim 27 simply recites a hollow cutting-nozzle body having an axis, without defining such axis as a longitudinal axis. Indeed, the only orientational definition of the axis recited in claim 27 is that the shut-off element is movable along the axis and that at least one nozzle extends radially with respect to the axis. The axis along which the Kobayashi change-over valve 42 is

movable meets both of these criteria, as the supply path 32 extends radially or transversely with respect thereto.

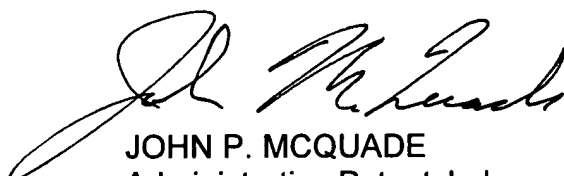
In light of the above, we do not find the appellants' argument persuasive that the rejection of claim 27 as being anticipated by Kobayashi is in error. The rejection is thus sustained. As the appellants' arguments on pages 5 and 6 of the brief with respect to the like rejection of dependent claims 28 and 29 are predicated on the argument discussed above that the nozzle (supply path 32) extends axially and not radially with respect to the axis, these arguments are likewise not well founded. It follows that the rejection of claims 28 and 29 as being anticipated by Kobayashi is also sustained.


CONCLUSION


To summarize, the decision of the examiner to reject claims 27-29 under 35 U.S.C. § 102 is affirmed.

No time period for taking any subsequent action in connection with this appeal
may be extended under 37 CFR § 1.136(a).

AFFIRMED


JOHN P. MCQUADE
Administrative Patent Judge


JEFFREY V. NASE
Administrative Patent Judge


JENNIFER D. BAHR
Administrative Patent Judge

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